NO. 49781-6

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Detention of Charles Urlacher:

STATE OF WASHINGTON,

Respondent,

v.

CHARLES URLACHER,

Appellant.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Charles Urlacher, a sexually violent predator, petitioned for conditional release to a Less Restrictive Alternative (LRA). At trial, the jury unanimously found that the State proved beyond a reasonable doubt that Urlacher's proposed LRA is not in his best interest and does not include conditions that would adequately protect the community. The trial court properly instructed the jury as to all elements the State was required to prove at trial. The trial court exercised its discretion in not defining the phrases "best interest" and "adequate to protect the community," which are commonly understood phrases that require no definition. As explained by this Court in *Bergen,* these terms "can be understood by persons of common intelligence and reasonably applied within the statute's intent."[1] The instructions accurately stated the law, were not misleading, and allowed each party to argue its theory of the case. In rebuttal closing argument, the prosecutor accurately informed the jurors of the law and their role as jurors. Further, it was not improper for the prosecutor to argue in rebuttal that jurors should not be fooled or groomed by Urlacher's testimony that he was a changed man. This Court should reject Urlacher's prosecutorial misconduct arguments and affirm the denial of Urlacher's release to an LRA.

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[1] *In re Det. of Bergen,* 146 Wn. App. 515, 520, 195 P.3d 529 (2008), *review denied,* 165 Wn.2d 1041, 205 P.3d 132 (2009).

II. RESTATEMENT OF THE ISSUES

A. Were the jury instructions sufficient where they accurately informed the jury of all elements the State was required to prove and where they informed the jury of the applicable law, were not misleading, and permitted the parties to argue their theories of the case?

B. Where the phrases "best interest" and "adequate to protect the community" are commonly understood phrases that are not defined by statute, did the trial court abuse its discretion in deciding not to define the terms in the jury instructions?

C. Did the State commit prosecutorial misconduct by stating in rebuttal argument that jurors should not be fooled or groomed by Urlacher's testimony?

D. Did the State commit prosecutorial misconduct by accurately informing jurors in rebuttal argument that the phrases "best interest" and "adequate to protect the community" are not defined in the jury instructions and that they, as the trier of fact, need to determine what that means as it applies to Urlacher?

E. Does the "best interest" standard satisfy substantive due process where it is narrowly tailored to serve the State's compelling interest in treating sexual predators and protecting society?

F. If the State substantially prevails on appeal, should the Court address any requests and objections to costs at that time?

III. STATEMENT OF THE CASE

A. Procedural History

In September 2011, Urlacher was committed as a sexually violent predator (SVP) and placed at the Special Commitment Center for control, care, and treatment until his mental condition has so changed that he is safe to be unconditionally released or conditionally released to an LRA.

CP 267-68, 284. In December 2015, Urlacher petitioned the court for conditional release to an LRA, and the court ordered an LRA trial. CP 268-70. The jury unanimously found that the State proved beyond a reasonable doubt that Urlacher's proposed LRA is not in his best interest and does not include conditions that would adequately protect the community. CP 659, 668. Based on the jury's verdict, the court denied Urlacher's petition for conditional release. CP 676.

B. Trial Testimony

1. Urlacher's Mental Abnormality and History of Sexual Offending

Urlacher testified in detail about his history of sexually assaulting numerous young boys, including his two sons. RP 28-30, 44-45, 51-76.[2] He testified that he groomed his sons and their friends for sexual gratification and that he used his son as bait to gain access to other victims. *See* RP 57-59, 63-68. Although Urlacher initially testified to having seven victims, he later testified to having eight victims. RP 60, 75.[3] The State's expert, Dr. Harry Goldberg, testified that Urlacher suffers from Pedophilic Disorder,[4] which is a

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[2] For the Court's convenience, the State is using the same Report of Proceedings (RP) citation system used by Urlacher: cites to the trial will be RP and cites to any other hearing will include the date. *See* Appellant's Opening Brief (hereafter App. Brief) at 4.

[3] The State's expert testified that Urlacher has ten victims. RP 289.

[4] Pedophilic Disorder is recurrent, intense sexually arousing fantasies or behaviors involving sexual activity with prepubescent children. RP 227-28.

mental abnormality, and Narcissistic Personality Traits. RP 219, 229. Urlacher agreed that he suffers from these diagnoses and that his sexual attraction to prepubescent boys "will always be there." RP 38, 78-79.

2. Dr. Goldberg's Testimony Regarding the Proposed LRA

Dr. Goldberg testified in detail about how Urlacher's LRA plan is not in his best interest and does not include conditions adequate to protect the community. He testified that Urlacher still needs to address numerous dynamic risk factors before he is safe to be released and that Urlacher has not made sufficient treatment gains such that an LRA is in his best interest. *See* RP 256-72, 287-90. Dr. Goldberg expressed concern about Urlacher not completing treatment assignments and noted that Urlacher has "a fair amount of work to be done" on his offense cycle, which is a "very important aspect of treatment." RP 280.

Urlacher has been secretive and has lacked transparency regarding his sexual thoughts. RP 261, 279, 285.[5] He has had ongoing problems accepting feedback in treatment and only recently started to work on his narcissistic personality traits. RP 283-86, 288-89, 330, 375-76, 416-22, 430-32. Dr. Goldberg also expressed concern that Urlacher has not accepted

[5] For example, Urlacher's treatment provider discovered that Urlacher had been using the name of a former victim in his fictional masturbatory script. RP 486-88. Dr. Goldberg testified that this was concerning, as was the fact that some of the details in the script mimicked Urlacher's offense pattern. RP 278-79.

responsibility for how many children he victimized and that the number continues to be "a moving target." *See* RP 265, 289-90. He testified, "Just in April he told me he had seven victims. Now he says he has eight victims. I count ten. I mean, I think this needs to be fleshed out before he gets into the community." RP 289-90.

Urlacher still becomes partially aroused to "ongoing images of children that pop up in his mind" and Dr. Goldberg testified that he has "serious concerns about whether this can be managed in a less restrictive alternative." *See* RP 285. In a recent role-playing incident involving a child on a bus, Urlacher "literally froze" and did not know what to do. RP 91-93, 285. His blood pressure increased, and he started to sweat profusely. RP 91-93, 421. Urlacher acknowledged feeling overwhelmed and reported that he had not thought about what he would do in such situations. RP 421. At trial, Urlacher agreed that he was concerned about encountering such a situation in real life and dealing with it in a negative way. *See* RP 92. Dr. Goldberg questioned Urlacher's ability to handle being in the community with a real child when he was unable to handle a role-playing incident in treatment. RP 285. Dr. Goldberg explained that this is a "clear indication" that Urlacher is not ready for an LRA. RP 286.

Dr. Goldberg opined that Urlacher has "a lot of issues to work on" and that "it's premature at this point to think that he's now ready for the

next step." RP 288-89, 396. He explained that Urlacher's community safety plan is incomplete, and he has not effectively dealt with his risk factors such that his LRA plan would adequately protect the community. RP 269, 287. Dr. Goldberg opined that Urlacher's proposed LRA is not in his best interest and does not include conditions adequate to protect the community. RP 290.

3. Expert Testimony Defining "Best Interest"

The State did not elicit testimony from either expert about the definition of "best interest." *See* RP 188-291, 380-92, 582-626, 631-33. On cross-examination, Urlacher questioned Dr. Goldberg about what "best interest" means to him. *See* RP 314-35. Dr. Goldberg testified that it is "a fairly nebulous term" that is not defined by statute or in the psychological literature. RP 314-16. He explained that forensic evaluators "use their clinical judgment" in evaluating whether a proposed plan is in the person's best interest. RP 316. Dr. Goldberg agreed that he uses his own definition of "best interest" and that he considers what is "reasonable" and best for the person. RP 316-17. He considers whether the person "is ready both clinically and behaviorally" and can demonstrate consistent motivation and skills to be successful if released to an LRA. RP 317-18, 326-27. Dr. Goldberg elaborated that it would not be in a person's "best interest" to be prematurely released into the community and be unable to handle

conditions of release because it could lead to revocation of the LRA and a delay in the transition process. RP 317.

Urlacher also asked his own expert, Dr. Paul Spizman, to define "best interest" for the jury. RP 533. Dr. Spizman also used his own definition of "best interest," which he explained as follows:

> The way that I look at that is, how is the individual progressing in treatment; are they doing well enough. And you can think of sort of it as ball player analogy; is somebody in high school ball doing so well that they're able to step up to college play at this point in time. Do they have the skills? Do they have the knowledge? Are they applying them? Are they participating effectively? So in somebody like Mr. Urlacher's case, I'm going to ask do they understand things such as their dynamic risk factors; if so, do they have interventions in place. For example, in his testimony the other day he was talking about intervening on his problematic sexual thoughts. Or has he improved in areas such as his emotional containment. And as you heard earlier this morning, that he is able to effectively participate in group sessions, that sort of thing that says are they ready for the next step; are they ready to move out in the community. And, of course, in the community you want to examine things such as their housing placement to assure it's adequate; do they have community support out there to assist them as necessary, those types of things. So are they ready to move on, is the essence of it.

RP 533-34. Dr. Spizman testified that there are other important factors to consider beyond Urlacher's treatment needs in deciding whether the plan is in Urlacher's "best interest," including community support and the housing plan, which involves social activities, religious programming, and a transitional employment program. *See* RP 533-34, 568-75, 642-43.

4. Expert Testimony Defining "Adequate to Protect the Community"

The State did not elicit testimony from either expert about the definition of "adequate to protect the community." *See* RP 188-291, 380-92, 582-626, 631-33. On cross-examination, Urlacher questioned Dr. Goldberg about what "adequate to protect the community" means to him. *See* RP 338-58. Dr. Goldberg testified that he uses his own definition for "adequate to protect the community" because it is neither a psychological term nor defined by statute. RP 338-39. He testified that this is "more of a clinical question than a research or actuarial question." RP 339. Dr. Goldberg looked at a variety of factors in determining whether Urlacher's proposed plan included conditions adequate to protect the community, including the treatment plan, the proposed housing, and the supervision involved. *See* RP 339-58. Urlacher asked Dr. Goldberg two leading questions about his interpretation of "adequate to protect the community:"

> And in your interpretation of the phrase "adequate to protect the community," in order to be adequate, we must protect the community from all risks of sexual violence re-offense; is that right?
>
> In other words, in your interpretation of "adequate to protect the community," we must make it a 0 percent risk of re-offense; is that right?

RP 358. Dr. Goldberg answered "Correct" to both questions. RP 358.[6] Urlacher also asked Dr. Spizman to define "adequate to protect the community" for the jury. RP 575. Dr. Spizman testified as follows:

> What I'm looking at are first starting with the individual; do they understand their dynamic risk factors and do they have interventions in place to adequately contain them. As with Mr. Urlacher, we see that he does. Then I want to look at the other factors as he moves out into the community, the housing program, the restrictions that will be upon him and who he's having contact with, so, for example, does he have positive support in his network that will report him for any violations, will he be under GPS, will he have chaperones with him. All of these sorts of things help contribute to this.

RP 575-76.

5. Jury Instructions

Prior to trial, the State filed a motion in limine seeking to prohibit Urlacher's expert from testifying about his interpretation of SVP case law. CP 335; RP (9/27/16) 93-98. Urlacher opposed this motion and argued that if the court does not define "best interest" and "adequate to protect the community" then the court should allow him to inquire of both experts what these terms mean. RP (9/27/16) 94-96. The court granted the State's motion, but allowed the experts to testify about their general understanding and "working definitions" of the terms as Urlacher requested. RP (9/27/16) 98; CP 507.

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[6] The following week, Urlacher made an oral motion for a mistrial based on these two leading questions, arguing that Dr. Goldberg's testimony was a misstatement of the law. RP 404-07. The court denied the motion. RP 407.

Urlacher proposed a jury instruction defining "best interest" and "adequate to protect the community." RP (9/27/16) 94-95; RP 963-66; CP 456-57. Urlacher proposed the following instruction defining "best interest":

> In evaluating whether or not the proposed less restrictive alternative plan is in the Respondent's best interests, you are to consider whether the proposed less restrictive alternative plan properly incentivizes successful treatment participation and whether it is the appropriate next step in the Respondent's treatment.

CP 456; RP 964. Urlacher proposed the following instruction on "adequate to protect the community:"

> When evaluating whether the Respondent's proposed less restrictive alternative plan is "adequate to protect the community", you are to consider the individual aspects of the Respondent's release plan, rather than the Respondent himself. It is not necessary that all risk be removed in order for the proposed less restrictive alternative plan to be "adequate to protect the community."

CP 457. The State objected to the proposed instructions and argued that the plain words do not require further instruction under *Bergen. See* RP 965; CP 474-75. The court declined to give the instruction defining "best interest" over Urlacher's objection, explaining that "*Bergen* said instructions weren't needed." RP 964-66.[7] The court declined to instruct the

[7] Although the court acknowledged that "some kind of instruction *might* be useful," it declined to give the instruction proposed by Urlacher. RP 965 (emphasis added). Urlacher did not propose a different instruction.

jury that "adequate to protect the community" means that the jury should "consider the individual aspects of the Respondent's release plan, rather than the Respondent himself." *See* RP 965-66; CP 457. However, the court granted Urlacher's request to instruct the jury that: "It is not necessary that all risk be removed in order for the proposed less restrictive alternative plan to be 'adequate to protect the community.'" *See* RP 965-66; CP 457, 671.

After closing arguments, where both parties argued their theories of the case, the jury returned a unanimous verdict finding that the State proved beyond a reasonable doubt that Urlacher's proposed LRA is not in his best interest and does not include conditions that would adequately protect the community. *See* RP 983-1041; CP 659, 668.

IV. ARGUMENT

A. The Trial Court's Instructions Accurately Reflected the Law and Allowed Each Party to Argue its Theory of the Case

1. Standard of Review

Alleged errors of law in jury instructions are reviewed de novo. *Fergen v. Sestero,* 182 Wn.2d 794, 803, 346 P.3d 708 (2015). However, a trial court's decision on whether or not to give a particular jury instruction is reviewed for an abuse of discretion. *Id.* at 802; *Seattle W. Indus., Inc. v. David A. Mowat Co.,* 110 Wn.2d 1, 9, 750 P.2d 245 (1988); *Terrell v. Hamilton,* 190 Wn. App. 489, 498, 505, 358 P.3d 453 (2015)

("trial courts retain broad discretion regarding whether to give a particular instruction"). Thus, a trial court's refusal to give a proposed jury instruction is reviewed only for abuse of discretion. *Rekhter v. State, Dept. of Soc. & Health Servs.,* 180 Wn.2d 102, 120, 323 P.3d 1036 (2014); *In re Det. of Pouncy,* 168 Wn.2d 382, 390, 229 P.3d 678 (2010); *In re Det. of Greenwood,* 130 Wn. App. 277, 287, 122 P.3d 747 (2005); *In re Det. of Taylor-Rose,* No. 47975-3-II, 2017 WL 3380960, at *6 (Wash. Ct. App. July 25, 2017). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *Terrell,* 190 Wn. App. at 499.

Jury instructions are sufficient when they permit each party to argue its theory of the case, are not misleading, and when read as a whole properly inform the jury of the applicable law. *Rekhter,* 180 Wn.2d at 117; *see Greenwood,* 130 Wn. App. at 287 (applying general rule to SVP case). A reviewing court should consider the jury instructions as a whole, with the primary purpose of ensuring that both parties are allowed to fairly state their case. *Rekhter*, 180 Wn.2d at 120.

2. A Trial Court's Decision Not to Define a Term Used in an Element is Not an Issue of Constitutional Magnitude

Not all instructional errors are of constitutional magnitude. *State v. Lord,* 117 Wn.2d 829, 880, 822 P.2d 177 (1991). The failure to

instruct a jury on every *element* of a charged crime is an error of constitutional magnitude. *State v. Gordon,* 172 Wn.2d 671, 677, 260 P.3d 884 (2011). However, as long as the instructions properly inform the jury of the elements, a failure to further define terms used in the elements is not of constitutional magnitude. *Id.; State v. Scott,* 110 Wn.2d 682, 689, 757 P.2d 492 (1988); *State v. Stearns,* 119 Wn.2d 247, 250, 830 P.2d 355 (1992). Even an error in defining technical terms does not rise to the level of constitutional error. *Gordon,* 172 Wn.2d at 677.

"Neither the failure to instruct on lesser included offenses, the failure to define individual terms in instructions, nor the failure to define technical terms in instructions are errors of constitutional magnitude." *Lord,* 117 Wn.2d at 880.[8] The requirements of due process are usually met when the jury is informed of all the elements and instructed that the State must prove each element beyond a reasonable doubt. *Scott,* 110 Wn.2d at 690. "[W]e find nothing in the constitution, as interpreted in the cases of this or indeed any court, requiring that the meanings of particular terms used in an instruction be specifically defined." *Id.* at 691.[9]

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[8] Examples of manifest constitutional errors in jury instructions are: directing a verdict; shifting the burden of proof to the defendant; failing to define the "beyond a reasonable doubt" standard; failing to require a unanimous verdict; and omitting an element of the crime charged. *Scott,* 110 Wn.2d at 688 n.5.

[9] Urlacher's reliance on *Martin* as support for his due process argument is misplaced. *See* App. Brief at 28-29 (citing *In re Det. of Martin,* 163 Wn.2d 501, 511,

"The constitutional requirement is only that the jury be instructed as to each element of the offense charged." *State v. Pawling,* 23 Wn. App. 226, 232, 597 P.2d 1367 (1979). In *Pawling,* the Court held that the failure of the trial court to define the word "assault" referenced in the burglary instruction was not an issue of constitutional magnitude. *Id.* at 232-33. The Court explained that there was no need to define "assault" because "an understanding of its meaning can fairly be imputed to laymen." *Id.* at 233. Similarly, in *Ng,* the Court held that the trial court did not abuse its discretion in not defining the term "theft" used in the robbery instructions. *State v. Ng,* 110 Wn.2d 32, 44-45, 750 P.2d 632 (1988). The Court explained that the term is "of sufficient common understanding" and it was within the trial court's discretion to determine whether words used in an instruction required further definition. *Id.*

Thus, the trial court's decision not to define "best interest" and "adequate to protect the community" is not an issue of constitutional magnitude. *See Stearns,* 119 Wn.2d at 249-50 (any error in not defining the term "manufacture" contained in the statutory elements is not an issue of constitutional magnitude).[10] Consequently, review is not de novo; rather,

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182 P.3d 951 (2008)). *Martin* involved an issue of statutory construction and was decided based on the plain language of the statute. It has no applicability to Urlacher's case.

[10] Unlike the defendants in *Pawling, Ng,* and *Stearns* who did not request instructions defining the terms at trial, Urlacher may raise the issue on appeal because he objected to the instructions at trial. *See* RP 964-66.

the proper standard of review is abuse of discretion. *See State v. Johnson,* 125 Wn. App. 443, 457, 105 P.3d 85 (2005) (constitutional issues are reviewed de novo).[11]

3. The Trial Court Did Not Abuse its Discretion by Refusing to Define Commonly Understood Terms

The trial court did not abuse its discretion by deciding not to define the terms "best interest" and "adequate to protect the community." "Where the legislature has not defined a term, we must give it its everyday meaning." *Pawling,* 23 Wn. App. at 233. Commonly understood words require no definition. *State v. Guloy,* 104 Wn.2d 412, 417, 705 P.2d 1182 (1985). This Court has held that the terms "best interest" and "adequate community safety"[12] can be understood by persons of common intelligence and reasonably applied within the statute's intent. *Bergen,* 146 Wn. App. at 520.

Whether words used in an instruction require further definition is within the discretion of the trial court. *Guloy,* 104 Wn.2d at 417. Although trial

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[11] Citing *Fisher,* Urlacher claims that refusal to give a proposed instruction is an issue of law subject to de novo review. App. Brief at 12 (citing *State v. Fisher,* 185 Wn.2d 836, 849, 374 P.3d 1185 (2016)). Urlacher's misconstrues *Fisher*. In *Fisher,* the trial court refused to instruct the jury on Fisher's affirmative defense to felony murder charges. *Fisher,* 185 Wn.2d at 848. The Court applied de novo review because whether there is "sufficient evidence to raise a claim of self-defense *is a matter of law* for the trial court." *Id.* at 849 (emphasis added). *Fisher* involves the failure of a trial court to instruct the jury on a legal defense to criminal charges. *See id.* at 848-49. It does not stand for the proposition that a court's refusal to give a proposed instruction is subject to de novo review. *See also State v. Walden,* 131 Wn.2d 469, 473, 932 P.2d 1237 (1997) (misstating the law of self-defense is an error of constitutional magnitude).

[12] The phrases "adequate community safety" and "adequate to protect the community" are used interchangeably in this brief and have the same meaning.

courts should define technical words, they need not define words and phrases that are of common and ordinary understanding or self-explanatory. *Pouncy,* 168 Wn.2d at 390; *State v. Brown,* 132 Wn.2d 529, 611-12, 940 P.2d 546 (1997); *State v. O'Donnell,* 142 Wn. App. 314, 325, 174 P.3d 1205 (2007). A term is technical when its legal definition differs from the common understanding of the word. *O'Donnell,* 142 Wn. App. at 325.

A trial court does not abuse its discretion by refusing to define words found in daily use that are neither technical nor used in any "special legal sense." *See Guloy,* 104 Wn.2d at 417 (the phrase "common scheme or plan" involves words of common understanding and need not be defined). In *Pouncy,* the Court held that the term "personality disorder" is a technical term that is beyond the experience of the average juror and should be defined for the jury. *Pouncy,* 168 Wn.2d at 391. The Court explained that "personality disorder" is not in common usage and has a well-accepted psychological meaning that is "a term of art" under the Diagnostic and Statistical Manual of Mental Disorders (DSM). *Id.* On the contrary, the phrases "best interest" and "adequate to protect the community" are commonly understood phrases that are self-explanatory and require no definition. *See Bergen,* 146 Wn. App. 515. As Dr. Goldberg testified, these phrases are not psychological terms and are not defined in the DSM or in the psychological literature. RP 314-16, 338-39. The phrases are also not defined in the statute; rather, the words in the phrases are found in daily

use and are neither technical nor applied in any "special legal sense." Consequently, the trial court properly exercised its discretion in deciding not to define these commonly understood phrases.

a. "Best Interest" is a Commonly Understood Phrase That is Not Limited Solely to Treatment

Urlacher claims that *Bergen* concluded that the "best interest" standard "relates solely to treatment needs." App. Brief at 19 (citing *Bergen,* 146 Wn. App. at 528-29). Urlacher misconstrues *Bergen.* Although consideration of an SVP's treatment needs is part of the "best interest" determination, the inquiry is not limited solely to treatment as Urlacher suggests. *See Bergen,* 146 Wn. App. at 529-32. Bergen made a vagueness challenge based on the trial court's failure to define "best interest" in the jury instructions. *Id.* at 531. Bergen argued that what might be in his best interest was "so amorphous and subjective" that jurors could have inappropriately considered any number of subjective factors:

> ...some jurors might have believed continued confinement was in his best interests because he was not at risk to reoffend against a minor, while others might have believed that community notification requirements might pose threats to his safety if released..., and still others might have believed that continued confinement would be in his best interest because he was unlikely to succeed in his LRA placement and would be more angry when returned to the SCC than if he were never released at all.

Id. at 530-31. But as the Court explained, "*all* of these scenarios fall reasonably within the 'best interests' determination contemplated by the statute." *Id.* at 531 (emphasis added).

In rejecting Bergen's vagueness challenge, the *Bergen* Court explained that "an ordinary person would understand that determining whether an LRA is in his 'best interests' involves considering whether it would adequately serve his treatment needs as an SVP." *Id.* Thus, the treatment needs of an SVP are just one aspect of the "best interest" determination. It also includes other considerations such as the likelihood of not succeeding on the LRA and risking revocation and the risk of reoffending which could result in a violation of conditions of release, termination of treatment, or possible criminal charges and return to prison. *See id.* at 529-32. As the Court explained, all of these consequences relate to the "best interest" determination. *Id.* at 532.

Urlacher argues that the trial court should have given his proposed definition of "best interest"[13] because otherwise "the jury had no way of knowing that 'best interests' relates to only to [sic] treatment, and not to Mr. Urlacher's general welfare." App. Brief at 21. He argues that jurors must be instructed that it relates only to his "potential for success in

[13] Urlacher's proposed instruction directed jurors to consider only whether the proposed LRA plan "properly incentivizes successful treatment participation and whether it is the appropriate next step in the Respondent's treatment." *See* CP 456; RP 964.

treatment, not to other aspects of his life." *See* App. Brief at 30. First, the "best interest" determination does not relate *only* to treatment. *See Bergen,* 146 Wn. App. at 529-32. Even Urlacher's expert testified that there are other important factors to consider beyond treatment in determining what is in Urlacher's "best interest," including the housing plan and support network. *See* RP 533-34, 568-75, 642-43. Urlacher's narrow interpretation in his proposed instruction improperly limited the evidence jurors were permitted to consider and implied limitations that do not exist in the law. "A trial court is under no obligation to give inaccurate or misleading instructions." *State v. Ehrhardt,* 167 Wn. App. 934, 939, 276 P.3d 332 (2012). In refusing to give Urlacher's proposed instruction, the trial court took issue with some of the wording in the instruction and correctly explained that "*Bergen* said instructions weren't needed." *See* RP 964-66.[14]

Moreover, despite arguing that the "best interest" standard relates only to treatment, Urlacher inexplicably contradicts this argument by subsequently conceding that the phrase "best interests," by itself, "is not inherently limited to treatment-related considerations." *See* App. Brief at 34. Urlacher goes on to

[14] The record does not support Urlacher's claim that the trial court made its decision "in chambers" and did not explain its reasoning on the record. *See* App. Brief at 21, n.17; *see also* RP 957-58, 964-66. Although there was an initial informal discussion about instructions off the record, there is no indication that this occurred in chambers. *See* RP 957-58. Further, the court subsequently went through the proposed instructions individually on the record and invited the parties to make a record about each instruction. *See* RP 957-66.

apply the ordinary dictionary definition of "best interests" and argues that it is "broad and comprehensive" and clear and "requires jurors to consider a detainee's general welfare or well-being." App. Brief at 46. The doctrine of judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Pegram v. Herdrich,* 530 U.S. 211, 227 n.8, 120 S. Ct. 2143, 147 L. Ed. 2d 164 (2000).

Second, nothing in the trial court's instructions prohibited Urlacher from arguing his theory of the case as he asserts with no further explanation. *See* App. Brief at 23. The Supreme Court has recognized that failure to give a definitional instruction is not failure to instruct on an essential element. *Brown,* 132 Wn.2d at 612; *Scott,* 110 Wn.2d at 690. The record in Urlacher's case shows that the trial court instructed the jury on all essential elements and that Urlacher was able to argue his theory of the case. *See* CP 668; RP 993-1028.

In closing argument, Urlacher argued that the question is whether Urlacher is "ready for that next step in treatment." RP 999. Urlacher argued that he has made good strides in treatment, that he has been consistent and motivated in treatment, and that he understands his offense cycle, his triggers for reoffending, his interventions, and his risk factors. *See* RP 998-1003, 1011-14. Urlacher argued that the jury was tasked with determining whether the LRA is "in his best interest; is this the next step for

him." RP 1001. Urlacher referenced Dr. Spizman's testimony about how the "best interest" standard should "incentivize treatment" and that the LRA is in his "best interest" because Dr. Spizman testified that Urlacher has a good understanding of his risk factors, is appropriately using interventions, and is "ready for the next step in treatment[.]" RP 1011.

Urlacher also argued in closing that his LRA treatment plan is in his best interest because it involves "an outstanding treatment provider providing the best practices in treatment" and "the best treatment that we can provide[.]" RP 1016. Urlacher also attacked the credibility of the State's expert and his approach to the "best interest" standard. *See* RP 1005-06. Thus, Urlacher's claim that he was not allowed to argue his theory of the case is completely disingenuous. The record shows that the instructions not only allowed Urlacher to argue his theory of the case, but also that he did so throughout closing argument. *See* RP 993-1028.

Urlacher argues that the State made an "improper" closing argument by stating that because "best interest" is not defined in the jury instructions, "you, as the trier of fact, will be the individuals who will decide amongst yourselves how you're going to decide what that means as it applies to Mr. Urlacher." *See* App. Brief at 22. There was nothing improper about this argument. The State argued this in *rebuttal* in response to Urlacher's closing argument about his proposed housing plan. *See* RP 1033-34. Urlacher argued

that he and "the community really could not ask for a better housing transitional plan in the community, period." RP 1018-20. The State responded:

> [Urlacher] tells you that the housing is the gold standard and you couldn't ask for anything better. Well, you'll have to determine that because at the end of the day these are all the questions that you're being asked to do as 12 people from our community, that you come with your life experiences and you bring your collective conscious together and you talk about these things and you say, because best interests and adequate to protect the community are not defined in your jury instructions, you, as the trier of fact, will be the individuals who will decide amongst yourselves how you're going to decide what that means as it applies to Mr. Urlacher.

RP 1033-34. The State then pointed out some "risky circumstances" in the plan, including the fact that there are no night checks, no counts, and the "sign in and sign out is only as good as a person's willingness to do it." RP 1034. The State argued, "Is that the kind of housing we're really talking about that would be in Mr. Urlacher's best interest?" RP 1034. There was nothing improper about the State informing jurors that it was their job to decide if the LRA is in Urlacher's best interest. That was the jury's role. *See Bergen,* 146 Wn. App. at 533 (jury's role is to decide whether the facts presented meet a particular standard).

Urlacher asserts that the State's argument encouraged jurors to consider irrelevant issues as to the "best interest" standard. App. Brief at 22. His argument that some jurors might have projected onto Urlacher "their own desire to live on an island rather than in a city, while still others

may have predicted that Mr. Urlacher's diet might be less nutritious if he lived on his own" is absurd and not supported by the record. *See id.* The "best interest" standard "can be understood by persons of common intelligence and reasonably applied[.]" *Bergen,* 146 Wn. App. at 520. The court instructed the jury "to decide the facts in this case based upon the evidence presented" during trial and to reach a decision "based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference." CP 661-63. "A jury is presumed to follow the court's instructions and that presumption will prevail until it is overcome by a showing otherwise." *Carnation Co., Inc. v. Hill,* 115 Wn.2d 184, 187, 796 P.2d 416 (1990). There were no facts presented at trial or arguments made by the State about Urlacher's diet or the desirability of living on an island. The State's rebuttal was a proper statement of the law and did not invite jurors to consider facts not in evidence.

b. "Adequate to Protect the Community" is a Commonly Understood Phrase

The *Bergen* Court rejected Bergen's vagueness challenge to the phrase "adequate community safety," finding that the phrase "clearly conveys the idea that an LRA must adequately address community safety concerns." *Bergen,* 146 Wn. App. at 532. The Court held each of the words in the phrase is commonly used and "persons of common intelligence do

not need to guess at their meaning." *Id.* The Court explained that "the jury is simply deciding whether the facts presented (i.e., the proposed LRA and its effect on community safety) have met a particular standard (i.e., adequate community safety), which is precisely what juries do." *Id.* at 533.

Using a statutory construction analysis, the *Bergen* Court explained that "adequate to protect the community" should be given its ordinary meaning because the phrase is not defined by statute and plain words do not require construction. *Id.* at 534. In *Bergen,* the trial court refused to give Bergen's proposed instruction because it would have erroneously instructed the jury that "adequate community safety" related to Bergen's risk of re-offense rather than the sufficiency of the proposed plan. *Id.* at 533-34.[15] The *Bergen* Court explained that the phrase "should be given its ordinary meaning, which is not the definition Bergen proposed." *Id.* at 534.

The specific language of jury instructions is a matter left to the trial court's discretion. *Id.* at 533 (citing *Petersen v. State,* 100 Wn.2d 421, 440, 671 P.2d 230 (1983)). Thus, it was within the trial court's discretion to reject the specific language Urlacher requested in the jury instruction. The standard is whether the instructions allow the parties to argue their theories of the case, not whether the instructions are exactly what each party

[15] Bergen proposed a jury instruction that defined "adequate community safety" as a risk of re-offense less than 50 percent. *Id.* at 532-33.

wanted in order to emphasize his theory of the case. *See State v. Hartzell,* 156 Wn. App. 918, 937, 237 P.3d 928 (2010) (court is not required to give an instruction in the exact language proposed by a party). "[T]he fact that it would be proper to include certain language in a jury instruction does not mean that the trial court was required to include that language." *Taylor-Rose,* 2017 WL 3380960 at *7 (citing *Terrell,* 190 Wn. App. at 506). The issue is whether the trial court abused its discretion in not including the language. *See Taylor-Rose,* 2017 WL 3380960 at *7.

Urlacher argues that jurors should have been instructed that "adequate to protect the community" requires them to consider the individual aspects of his release plan, "rather than the Respondent himself" and that jurors "had no way of knowing that the community protection element required the state to prove the plan inadequate." App. Brief at 26. The record does not support this argument. The trial court explicitly instructed the jury that the State must prove beyond a reasonable doubt that the proposed LRA plan "does not include conditions that will adequately protect the community." *See* CP 668. The State did not tell jurors to "make up and apply their own standard" as Urlacher claims. *See* App. Brief at 27. Rather, the State merely informed jurors that there is no legal definition for "adequate to protect the community" and that as the trier of fact they will need to determine if Urlacher's plan is adequate. *See* RP 1033-34.

This is consistent with *Bergen,* which held that persons of common intelligence do not need to guess at the meaning of the phrase. *See Bergen,* 146 Wn. App. at 532. Moreover, despite arguing that jurors must be instructed that "adequate to protect the community" relates to "the plan, not the person," Urlacher subsequently contradicts this argument by conceding that the plain language of the phrase "does not require an exclusive focus" on the plan as opposed to the person. *See* App. Brief at 30, 34.

The trial court properly instructed the jury on every element the State was required to prove beyond a reasonable doubt. *See* CP 668. The jury instructions correctly stated the law, were not misleading, and allowed Urlacher to argue his theory of the case. In closing argument, Urlacher argued that he presented a plan that included conditions that would slowly transition him into the community with "great accountability" to ensure the community is adequately protected. RP 1014. Urlacher described in detail how his plan would protect the community, including the high level of accountability, supervision, and access to resources. *See* RP 1014-28. In urging the jury to disregard the opinion of the State's expert, Urlacher referenced the court's instruction, given at his request, that it is

"not necessary that all risk be removed" in order for the proposed LRA to be "adequate to protect the community." RP 1004-06; CP 671.[16]

Urlacher argues that jurors could have believed that the State met its burden by proving that Urlacher had "a high risk of recidivism," which he claims is "exactly the approach taken by Dr. Goldberg." App. Brief at 26 (citing RP 290, 338-39). Urlacher misrepresents Dr. Goldberg's testimony. This was not the approach taken by Dr. Goldberg. *See* RP 338-58. Dr. Goldberg testified that whether a plan is adequate to protect the community is "more of a clinical question than a research or actuarial question" and that there is *not* an actuarial instrument on risk that addresses this issue. *See* RP 338-39.[17] Rather, Dr. Goldberg looked at a variety of factors in determining whether Urlacher's proposed plan included conditions adequate to protect the community, including the specific course of treatment, the housing plan, and the level of supervision. *See* RP 339-58.

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[16] Urlacher's argument is in response to Dr. Goldberg's testimony that, in his opinion, a plan that is adequate to protect the community should eliminate all risk of sexual re-offense. *See* RP 358. The trial court noted it did not believe the jury considered this testimony as a statement of the law. RP 407. Expert witnesses may testify as to matters of law, but may not give legal conclusions such as whether a particular law applies to a case. *State v. Olmedo,* 112 Wn. App. 525, 532, 49 P.3d 960 (2002). Further, Dr. Goldberg's testimony is consistent with *Bergen,* which noted that the "adequate community safety" determination is "whether the proposed LRA will prevent an otherwise-likely offense if he is released." *See Bergen,* 146 Wn. App. at 533.

[17] An actuarial instrument combines factors that contribute to sexual re-offense in a statistical manner in order to give a general risk level estimate. RP 359. Dr. Goldberg testified that actuarial assessment is "something I look at" in the overall assessment and that Urlacher's score indicated relatively "*low* risk." RP 367-68 (emphasis added).

Thus, the jury instructions were proper and did not relieve the State of its burden of proving the elements beyond a reasonable doubt.

Citing *Smith,* Urlacher argues that it "cannot be said that a defendant has had a fair trial if the jury must guess at the meaning of an essential element of a crime" and that the "same is true when a jury must guess at the meaning of the elements at a conditional release trial." *See* App. Brief at 29-30 (quoting *State v. Smith,* 131 Wn.2d 258, 263, 930 P.2d 917 (1997)). Urlacher's reliance on *Smith* is misplaced. First, the "to convict" instruction in *Smith* failed to include all elements of the crime, and the Court held that jurors are not required to supply an omitted element by searching other instructions to make sense of an erroneous "to convict" instruction. *Smith,* 131 Wn.2d at 262-65. Unlike Smith's case, the trial court properly instructed the jurors as to all elements the State was required to prove. *See* CP 668. Second, this Court has held that words in the phrase "adequate community safety" are commonly used and persons of common intelligence "do not need to guess at their meaning." *Bergen,* 146 Wn. App. at 532.

Finally, Urlacher indicates that *Bergen* is the only case clarifying the "best interest" and "adequate to protect the community" standards and that the Supreme Court "has not had occasion to interpret the statutory language." App. Brief at 14 n.12. On the contrary, the Supreme Court

denied Bergen's petition for review. *In re Det. of Bergen (Bergen II),* 165 Wn.2d 1041, 205 P.3d 132 (2009). Thus, the Supreme Court *did* have the opportunity to interpret the statutory language and elected not to.

4. There is No Basis to Apply a Heightened Standard of Clarity Found Only in Self-Defense Criminal Cases to Jury Instructions in SVP Civil Commitment Proceedings

Urlacher claims that jury instructions in "criminal cases" must make the relevant standard "manifestly apparent to the average juror" and urges this Court to use this "heightened standard for instructional clarity drawn from criminal law." App. Brief at 13. Urlacher mischaracterizes the jury instruction standard in criminal cases. In criminal cases, jury instructions are proper when they allow each party to argue its theory of the case, are not misleading, and properly inform the jury of the applicable law. *See State v. Barnes,* 153 Wn.2d 378, 382, 103 P.3d 1219 (2005); *see also State v. Winings,* 126 Wn. App. 75, 86, 107 P.3d 141 (2005). This is the same standard applied in SVP proceedings. *See Greenwood,* 130 Wn. App. at 287. The heightened appellate scrutiny applies only to *self-defense* jury instructions. *See State v. Woods,* 138 Wn. App. 191, 196, 156 P.3d 309 (2007).

"[O]ur Supreme Court subjects self-defense instructions to more rigorous scrutiny." *State v. Rodriguez,* 121 Wn. App. 180, 185, 87 P.3d 1201 (2004). Jury instructions on self-defense must more than adequately convey the law; rather, when read as a whole, they must make

the relevant legal standard "manifestly apparent to the average juror." *Id.; Woods,* 138 Wn. App. at 196; *Walden,* 131 Wn.2d at 473.[18] Thus, Urlacher's reliance on self-defense cases for his argument that courts should apply this heightened standard to SVP proceedings is misplaced. *See* App. Brief at 13 (citing *State v. Kyllo,* 166 Wn.2d 856, 864, 215 P.3d 177 (2009)).[19]

It is well established that SVP proceedings are civil, not criminal, in nature and courts have repeatedly refused to confer upon SVPs the same rights as criminal defendants. *See, e.g., In re Det. of Leck,* 180 Wn. App. 492, 503, 334 P.3d 1109 (2014); *In re Det. of Stout,* 159 Wn.2d 357, 369, 150 P.3d 86 (2007); *In re Det. of Petersen,* 138 Wn.2d 70, 91, 980 P.2d 1204 (1999); *In re Det. of Strand,* 167 Wn.2d 180, 191, 217 P.3d 1159 (2009). Furthermore, this Court has refused to apply the

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[18] In *Rodriguez,* the Court explained that the reasons for singling out self-defense jury instructions for increased appellate scrutiny are "a bit murky" but, "that said, it is the announced standard." *Rodriguez,* 121 Wn. App. at 185. If a defendant provides evidence of self-defense, the jury must be instructed in an "unambiguous way" that the State must prove the absence of self-defense beyond a reasonable doubt. *State v. Redwine,* 72 Wn. App. 625, 630-31, 865 P.2d 552 (1994). This shifting burden of proof, along with the subjective and objective elements incorporated in the self-defense standard, likely explains why courts apply heightened appellate scrutiny in such cases. *See Woods,* 138 Wn. App. at 196-99 (explaining self-defense standard and shifting burdens of proof).

[19] Urlacher argues that instructions may be clear "to the trained legal mind" without adequately communicating an important legal standard to the average juror. App. Brief at 15 (quoting *State v. Fischer,* 23 Wn. App. 756, 759, 598 P.2d 742 (1979) "(cited with approval by *State v. Allery,* 101 Wn.2d 591, 595, 682 P.2d 312 (1984))"). First, both of these cases cited by Urlacher are self-defense cases, which have no applicability here. Second, *Allery* does not cite the concept quoted by *Fischer* "with approval" as Urlacher claims. *See Allery,* 101 Wn.2d at 595. *Allery* only stands for the proposition that self-defense jury instructions must make the subjective self-defense standard "manifestly apparent to the average juror." *Id.*

"manifestly apparent" legal standard from *Kyllo*, which is a self-defense case, to jury instructions in SVP proceedings. *See Taylor-Rose,* 2017 WL 3380960, at *5 n.2. This Court distinguished *Kyllo,* noting that the court in that case was tasked with determining whether one incorrect instruction and one correct instruction read together made the correct standard apparent to the jury. *See Taylor-Rose,* 2017 WL 3380960, at *5 n.2. Neither Taylor-Rose nor Urlacher argue that the trial court gave contradictory instructions as was done in *Kyllo*. *See Taylor-Rose,* 2017 WL 3380960, at *5 n.2.

Citing *Miller,* Urlacher argues that in determining whether an instruction is misleading, courts look at "the way a reasonable juror *could have* interpreted the instruction." App. Brief at 13 (quoting *State v. Miller,* 131 Wn.2d 78, 90, 929 P.2d 372 (1997)) (emphasis in App. Brief). Urlacher's reliance on *Miller* is misplaced. In *Miller,* the jury instructions omitted a necessary *element* of the crime, and the Court's analysis involved an error affecting the defendant's constitutional rights. *Miller,* 131 Wn.2d at 86, 90-91 ("whether a defendant has been accorded full constitutional rights depends on the way a reasonable juror could have interpreted the instruction."). The Court explained that jurors are not required to search other instructions to figure out if another element should have been included in the instruction defining the crime. *Id.* at 90. *Miller* has

no application here because the trial court properly instructed the jury as to all elements the State was required to prove.

Citing *Wilcox,* Urlacher argues that "[p]rocedural due process requires instructions that do more than allow each side to argue its theory of the case; the instructions must not merely fail to mislead or clear the low bar of 'properly' informing the jury." App. Brief at 15 (citing *Wilcox v. Basehore,* 187 Wn.2d 772, 782, 389 P.3d 531 (2017)). First, the *Wilcox* case does not state anything resembling what Urlacher asserts. *Wilcox* is not a case about procedural due process; in fact, nowhere in the case is the phrase "due process" even uttered. Second, the case does not articulate a heightened standard that instructions "must not merely fail to mislead" as Urlacher claims. Rather, the case states the opposite of what Urlacher asserts and merely reiterates the standard requirement for jury instructions, which is that they "allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law." *See Wilcox,* 187 Wn.2d at 782.

5. Jury Instructions Are Not a "Procedure" Subject to a Procedural Due Process Balancing Test Under *Mathews*

Urlacher urges this Court to apply the *Mathews* balancing test[20] to what he refers to as the "procedure" of "the standard of clarity for jury

[20] The *Mathews* test balances: (1) the private interest affected; (2) the risk of erroneous deprivation of that interest through existing procedures and the probable value,

instructions" in LRA trials. App. Brief at 14-15 (citing *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)). Urlacher cites no authority for applying the *Mathews* procedural due process balancing test to defining words in jury instructions. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962); *see also State v. Hoisington,* 123 Wn. App. 138, 145-46, 94 P.3d 318 (2004) (argument is unpersuasive where party "cites no legal authorities to support his novel constitutional theory").[21]

This Court should reject Urlacher's attempt to improperly constitutionalize a trial court's discretionary decision. *See State v. Turnipseed,* 162 Wn. App. 60, 72-73, 255 P.3d 843 (2011) (Sweeney, J., concurring) ("a trend that is troublesome" is the "constitutionalization" of most assignments of error in criminal cases). There is no basis to apply a due process balancing test to a trial court's discretionary decision on whether or not to define words used in a jury instruction.

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if any, of additional procedural safeguards; and (3) the governmental interest, including costs and administrative burdens of additional procedures. *Stout,* 159 Wn.2d at 370.

[21] To the State's knowledge, there is no authority to apply the *Mathews* balancing test to jury instruction definitions.

SVP cases that apply the *Mathews* procedural due process balancing test all deal with some type of *procedure* at issue. *See e.g., In re Det. of Morgan,* 180 Wn.2d 312, 320-23, 330 P.3d 774 (2014) (applying *Mathews* test to process allowing commitment of incompetent SVPs); *Leck,* 180 Wn. App. at 504-08 (applying *Mathews* test to whether an SVP's due process right to notice was violated where jury was instructed on a disorder not alleged in the petition); *Stout,* 159 Wn.2d at 368-74 (applying *Mathews* test to whether SVP had a due process right to confront witnesses); *State v. McCuistion,* 174 Wn.2d 369, 392-95, 275 P.3d 1092 (2012) (applying *Mathews* test to statutory amendment requiring a treatment-based or physiological change for an SVP to show probable cause for a trial). Notably, SVP cases addressing whether a court should define words used in a jury instruction did not employ a *Mathews* balancing test as part of the analysis. *See Pouncy,* 168 Wn.2d 382; *Bergen,* 146 Wn. App. 515; *In re Det. of Twining,* 77 Wn. App. 882, 894 P.2d 1331 (1995), *abrogated by Pouncy,* 168 Wn.2d 382.[22] Thus, a trial

[22] However, even if the *Mathews* factors were (erroneously) applied to jury instructions, on balance the factors weigh in favor of the State and support the court's jury instructions. Although Urlacher has a significant liberty interest, there are substantial statutory protections against an erroneous deprivation of liberty and the jury instructions did not risk an erroneous deprivation of that interest. Further, the State has a substantial and compelling interest in protecting the community from SVPs. *See Leck,* 180 Wn. App. at 504-07; *see also Morgan,* 180 Wn.2d at 321-23.

court's discretionary decision to refuse to define a term used in a jury instruction is not subject to a procedural due process balancing test.

6. Substantive Due Process Does Not Require a Heightened Standard of Clarity for Jury Instructions in SVP Cases

Without citing to any authority, Urlacher claims that jury instructions in conditional release trials "that are not manifestly clear do not comport with substantive due process." *See* App. Brief at 18. Parties raising constitutional issues must present considered arguments to the Court of Appeals; "naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion." *State v. Johnson (Johnson II),* 119 Wn.2d 167, 171, 829 P.2d 1082 (1992); *see also Hoisington,* 123 Wn. App. at 145-47 (appellate courts "will not consider fleeting and unsupported assertions of constitutional claims."). Where no authorities are cited in support of a proposition, appellate courts may assume counsel has found none. *DeHeer,* 60 Wn.2d at 126.

Urlacher fails to cite to any relevant authority to support his novel claim that courts must define words in SVP jury instructions in order to comport with substantive due process. The limited cases cited by Urlacher allegedly supporting his due process argument do not stand for the propositions he claims they do. First, Urlacher's argument starts with the wrong premise: that he was somehow *entitled* to conditional release merely

because the court ordered a trial. *See* App. Brief at 18-19, 29. Urlacher is not entitled to conditional release until the court determines he is entitled to such a release. *See Bergen,* 146 Wn. App. at 526-27. Second, Urlacher misleads this Court by implying that all criminal cases use a higher standard of clarity in jury instructions. As previously discussed, they do not.[23] Third, Urlacher also misleads this Court by implying that *Kyllo* stands for the general proposition that substantive due process requires courts to provide instructions that make the law manifestly apparent to the average juror. *See* App. Brief at 19 (citing *Kyllo,* 166 Wn.2d at 864).

In *Kyllo,* a self-defense jury instruction misstated the law, thereby improperly lowering the State's burden of proof as to an element of the crime. *See Kyllo,* 166 Wn.2d at 862-65. Thus, *Kyllo's* holding was limited to: (1) a self-defense case involving a heightened standard of scrutiny; and (2) an erroneous jury instruction that improperly lowered the State's burden of proof on self-defense. *See id.* Finally, Urlacher misconstrues *McCuistion* by suggesting that it stands for the proposition that "[t]rials conducted with instructions that do not meet a high standard of clarity and thereby permit total confinement of residents who should be conditionally released are not narrowly tailored." *See* App. Brief at 19 (citing *McCuistion,*

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[23] Only self-defense cases are subject to increased appellate scrutiny. *See Rodriguez,* 121 Wn. App. at 185; *see also Woods,* 138 Wn. App. at 196.

174 Wn.2d at 387). *McCuistion* does not address jury instructions in any capacity and does not suggest that any part of the SVP civil commitment scheme is not narrowly tailored. *See McCuistion,* 174 Wn.2d 369.[24]

Urlacher again attempts to improperly constitutionalize a trial court's discretionary decision on whether or not to define terms used in a jury instruction. This is not a constitutional issue. *See Gordon,* 172 Wn.2d at 677; *Stearns,* 119 Wn.2d at 250; *Scott,* 110 Wn.2d at 689; *Lord,* 117 Wn.2d at 880. Failure to give a definitional instruction is not failure to instruct on an essential element. *Scott,* 110 Wn.2d at 690. Due process was satisfied when the trial court accurately instructed the jurors on the elements that the State was required to prove beyond a reasonable doubt. This Court should reject Urlacher's novel substantive due process argument.[25]

B. Urlacher Fails to Meet His Burden of Proving Prosecutorial Misconduct

Urlacher argues that the State committed prosecutorial misconduct during closing argument. App. Brief at 35-36. His arguments are without merit. First, Urlacher fails to meet his initial burden of showing that the

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[24] *McCuistion* held that the 2005 amendments to the SVP statute satisfy substantive due process because it does not permit continued commitment of a person who is no longer mentally ill and dangerous. *Id.* at 387-92. Thus, *McCuistion* found that the SVP statutory scheme is narrowly drawn to serve compelling state interests. *See id.*

[25] Urlacher cites to several cases in support of his claim that the trial court's failure to properly instruct the jury violated his due process rights; however, these cases do not stand for the proposition he claims they do. *See* App. Brief at 30.

prosecutor's statements were improper. Second, even assuming the statements were improper, because Urlacher failed to object at trial, he fails to meet his burden of showing the statements were so flagrant and ill-intentioned that an instruction could not have cured any prejudice.

1. Urlacher Must Show that the Prosecutor's Statements Were Both Improper and Prejudicial

Courts apply the prosecutorial misconduct standard used in criminal cases to SVP cases. *See In re Det. of Law,* 146 Wn. App. 28, 50-52, 204 P.3d 230 (2008); *In re Det. of Sease,* 149 Wn. App. 66, 80-81, 201 P.3d 1078 (2009). Urlacher "has a significant burden when arguing that prosecutorial misconduct requires reversal[.]" *See State v. Thorgerson,* 172 Wn.2d 438, 455, 258 P.3d 43 (2011). He must prove that the prosecutor's comments were both improper and prejudicial. *See State v. Allen,* 182 Wn.2d 364, 373, 341 P.3d 268 (2015).

If the defendant establishes that the prosecutor's comments were improper, the Court must then determine whether the defendant was prejudiced under one of two standards of review. *Allen,* 182 Wn.2d at 375; *State v. Emery,* 174 Wn.2d 741, 760, 278 P.3d 653 (2012). "If the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict." *Allen,* 182 Wn.2d at 375; *Emery,* 174 Wn.2d at 760. However, if

the defendant failed to object at trial, "the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Allen,* 182 Wn.2d at 375; *Emery,* 174 Wn.2d at 760-61.[26] A commitment will be reversed only if there is a substantial likelihood that the alleged misconduct affected the verdict. *See State v. Russell,* 125 Wn.2d 24, 86, 882 P.2d 747 (1994). A prosecutor's allegedly improper remarks must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in argument, and the instructions given. *Brown,* 132 Wn.2d at 561; *Thorgerson,* 172 Wn.2d at 443 (court should review statements in the context of the entire case).

The Supreme Court has consistently held that failure to object to an improper comment "constitutes waiver of error unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." *See e.g. Brown,* 132 Wn.2d at 561; *State v. Swan,* 114 Wn.2d 613, 661, 790 P.2d 610 (1990); *State v. Hoffman,* 116 Wn.2d 51, 93, 804 P.2d 577 (1991) (reversal is not required if the error could have been obviated by a

[26] Urlacher misstates the prosecutorial misconduct standard of review and fails to address the different standards of review that apply depending on whether he objected at trial to the alleged misconduct. *See* App. Brief at 36. He also conveniently leaves out the fact that he did not object to the statements at trial. *See id. at 35-41; see* RP 1033-34, 1040.

curative instruction which the defense did not request). The defendant must ordinarily move for a mistrial or request a curative instruction at trial. *Swan,* 114 Wn.2d at 661. The absence of a request for a mistrial "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." *Id.*

The standards of review are based on a defendant's duty to object to a prosecutor's allegedly improper argument. *Emery,* 174 Wn.2d at 761. Objections give the court an opportunity to correct counsel and prevent potential abuse of the appellate process. *See id.* at 761-62; *Swan,* 114 Wn.2d at 661 ("counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.").

2. The Prosecutor's Statement that Jurors Should Not Be "Fooled" or "Groomed" by Urlacher Was Not Improper

Urlacher argues that the prosecutor improperly appealed to the jury's passions and argued facts not in evidence by suggesting that Urlacher "was grooming the jury." App. Brief at 39. Urlacher's arguments lack merit. There was nothing improper about the prosecutor commenting that jurors should not be "fooled by" Urlacher or "subject to his grooming[.]" *See* RP 1040. The prosecutor made this statement in its *rebuttal* closing argument after Urlacher's attorney repeatedly referenced Urlacher's testimony

on the witness stand and all the changes Urlacher had allegedly made over the years. *See* RP 997-1002, 1024-27. A prosecutor is entitled to make a fair response to arguments of defense counsel. *Russell,* 125 Wn.2d at 87.

In closing argument, Urlacher's attorney argued that Urlacher is not just "talking the talk" but is "walking the walk" and has worked hard to learn skills and change his behavior. RP 998-1001. He argued that "Urlacher is transforming himself every day through hard work and treatment and a support network." RP 1024. In rebuttal argument, the prosecutor responded that the few gains Urlacher has made "are only recent" and that jurors should use their common sense while deliberating and not be "fooled" or "groomed" by Urlacher:

> So take the opportunity to use your recollection of the evidence, your common sense. Don't leave it here in the jury box. Use it as you deliberate with your fellow jurors, and we would submit to you that you should not be fooled by Charles Urlacher. You should not be subject to his grooming, that, in fact, the plan that he has proposed is not in his best interests and that the conditions that he currently has proposed before you are not adequate to protect the community.

RP 1040. Prosecutors have wide latitude in closing argument to argue reasonable inferences from the evidence, including references to a witness' credibility. *Thorgerson,* 172 Wn.2d at 448; *see Law,* 146 Wn. App. at 52.

The prosecutor's statement did not introduce facts not in evidence and was a reasonable inference from the evidence presented at trial.

Urlacher testified about the "grooming process" he used in order to gain access to victims, make them feel comfortable, and sexually assault them. RP 57-60, 63-68, 72-74, 78, 88, 101. He testified that "grooming" means "setting somebody up for an action whether it be legal or illegal, in this case illegal, breaking down natural barriers that a person, in this case a child, would have." RP 57. Dr. Goldberg testified that grooming is when an offender develops trust with the victim and their family with the eventual goal of molesting the child. RP 212-13. The prosecutor's statement that jurors should not be "fooled" or "groomed" by Urlacher was akin to telling jurors not to be tricked or manipulated by Urlacher's testimony that he was a changed man.[27]

Even assuming arguendo that the statement was improper, because Urlacher failed to object at trial,[28] he must show that the statement was "so flagrant and ill intentioned" that it caused prejudice incurable by a jury instruction. *See Swan,* 114 Wn.2d at 661; *Hoffman,* 116 Wn.2d at 93. Urlacher has not met this burden.[29] The prosecutor did not improperly

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[27] It was a juror, not the State, who proposed asking Dr. Spizman whether Urlacher's testimony could be Urlacher "grooming the jury." *See* RP 638. The court did not ask the question because it "seems a bit argumentative." RP 638. Urlacher's claim that the trial court "specifically prohibited" the prosecutor from asking this question misrepresents the record. *See* App. Brief at 39.

[28] *See* RP 1040.

[29] Urlacher misstates the law by implying that *all* deliberate appeals to passion and prejudice "constitute flagrant misconduct, requiring reversal even absent objection." *See* App. Brief at 38. While it is improper to deliberately appeal to the jury's passions or

appeal to the jury's passion or ask jurors to place themselves in the shoes of Urlacher's victims as Urlacher claims. The prosecutor merely pointed out that jurors should use their common sense in deciding how much credibility to give Urlacher's testimony. Urlacher's suggestion that the prosecutor "invited jurors to imagine themselves as the future child victims of a sexual offense perpetuated by Mr. Urlacher" is absurd. *See* App. Brief at 40-41.

The cases relied on by Urlacher involved flagrant and egregious conduct by the prosecutor and are not remotely similar to Urlacher's case. *See State v. Belgarde,* 110 Wn.2d 504, 755 P.2d 174 (1988) (prosecutor improperly appealed to jury's passion and prejudice by addressing defendant's ties to a group of "butchers and madmen who killed indiscriminately" and invited jurors to compare this to Wounded Knee); *see also State v. Pierce,* 169 Wn. App. 533, 280 P.3d 1158 (2012) (prosecutor improperly appealed to jury's passion by asking jurors to put themselves in the shoes of the murdered victims and imagine themselves in the position of being murdered in their own homes, by speculating on the defendant's thought process when no such facts were in evidence, and by fabricating an emotionally-charged story of how the victims might have struggled with the defendant and pleaded for mercy).[30]

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prejudices, unless a party objects at trial, the error is waived *unless the party establishes* that the misconduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice. *See In re Glasmann,* 175 Wn.2d 696, 704, 286 P.3d 673 (2012).

[30] Urlacher's reliance on two criminal cases for his assertion that "[r]eferences to sexual offending are inherently prejudicial" is also misplaced. *See* App. Brief at 40

Urlacher has not shown how the prosecutor's one statement, in the context of the entire trial, caused such prejudice that it affected the jury's verdict.

3. The Prosecutor Did Not Misstate the Law as to "Best Interest" or "Adequate to Protect the Community"

It is improper for a prosecutor to misstate the law. *Allen,* 182 Wn.2d at 373. As previously discussed, the prosecutor in Urlacher's case did not misstate the law. On the contrary, the prosecutor accurately informed the jurors, in *rebuttal* argument, that because the phrases "best interest" and "adequate to protect the community" are not defined in the jury instructions, they would need to determine, as the trier of fact, "what that means as it applies to Mr. Urlacher." *See* RP 1033-34. This statement did not invite jurors "to formulate their own definitions" for the phrases as Urlacher asserts. *See* App. Brief at 37. Rather, the prosecutor merely informed the jurors of their role. *See Bergen,* 146 Wn. App. at 533 (jury's role is to decide whether the facts presented meet a particular standard). This was a proper statement of the law, and there was no misconduct.

(citing *State v. Bluford,* 188 Wn.2d 298, 393 P.3d 1219 (2017) and *State v. Saltarelli,* 98 Wn.2d 358, 364, 655 P.2d 697 (1982)). These cases dealt with the potential of prejudice inherent in evidence of a prior sexual offense in a *criminal* case. Our Supreme Court has held that prior sex offenses are highly probative to various issues in SVP civil commitment trials. *See In re Det. of Turay,* 139 Wn.2d 379, 401, 986 P.2d 790 (1999); *see also In re Young,* 122 Wn.2d 1, 53, 857 P.2d 989 (1993), *superseded by statute on other grounds.*

4. The Cumulative Error Doctrine is Inapplicable

Urlacher argues that the cumulative effect of the prosecutor's misconduct deprived him of a fair trial. App. Brief at 41. Urlacher has failed to establish any error, let alone cumulative error justifying a new trial. The cumulative error doctrine is limited to situations where a combination of trial errors denies the accused a fair trial when any one error, taken individually, may not justify reversal. *In re Det. of Coe,* 175 Wn.2d 482, 515, 286 P.3d 29 (2012). "The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial." *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006); *see also State v. Korum,* 157 Wn.2d 614, 652, 141 P.3d 13 (2006) (reversal is not warranted if the claims of error are "largely meritless"). Urlacher must show how the combined claimed instances of prosecutorial misconduct affected the outcome of the trial. *See Thorgerson,* 172 Wn.2d at 454. Given these standards, the cumulative error doctrine does not apply.

C. The "Best Interest" Standard Satisfies Substantive Due Process

1. The "Best Interest" Standard is Narrowly Tailored to Serve the State's Compelling Interest in Treating SVPs and Protecting Society

The SVP civil commitment scheme involves a deprivation of liberty and is constitutional only if it is narrowly drawn to serve compelling state interests. *McCuistion,* 174 Wn.2d at 387. The State has a legitimate interest

in treating the mentally ill and protecting society from their actions. *In re Det. of Albrecht,* 147 Wn.2d 1, 7, 51 P.3d 73 (2002) (citing *Addington v. Texas,* 441 U.S. 418, 426, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979)). Our Supreme Court has held that Washington's SVP commitment scheme satisfies substantive due process. *Young,* 122 Wn.2d at 26-42, *McCuistion,* 174 Wn.2d at 384-92, 398.

In *Young,* the Supreme Court held that the SVP statute is narrowly tailored to serve the State's compelling interest in treating sexual predators and protecting society from their actions. *Young,* 122 Wn.2d at 26-37. The procedural safeguards, including procedures for periodic review after commitment, are sufficient to ensure that commitment is tailored to the nature and duration of mental illness and dangerousness. *Id.* at 26-42; *see Jones v. United States,* 463 U.S. 354, 368, 103 S. Ct. 3043, 77 L. Ed 2d 694 (1983) (due process requires that the nature and duration of commitment bear some reasonable relation to the purpose of commitment); *Foucha v. Louisiana,* 504 U.S. 71, 77-78, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992) (civil commitment statutes are constitutional when initial and continued confinement are based on the person's mental illness and dangerousness). In *Bergen,* this Court applied a strict scrutiny analysis and held that the "best interest" standard "is directly related to the SVP's dangerousness and mental illness and is narrowly tailored to serve the

State's compelling interest in appropriately treating dangerous sex offenders." *Bergen,* 146 Wn. App. at 527-29. The "best interest" standard accounts for "the inherent dangerousness of SVPs and their unique, extended treatment needs[.]" *Id.* at 529.

A statute is presumed constitutional, and the party challenging it bears the burden of proving it is unconstitutional beyond a reasonable doubt. *Id.* at 524. Facial challenges are generally disfavored and must be rejected unless there are "no set of circumstances" in which the statute can constitutionally be applied. *McCuistion,* 174 Wn.2d at 389. Urlacher claims that the "best interest" standard violates due process because it is not the "least restrictive means" of meeting the State's compelling interest in treating sexual predators and protecting society from their actions. However, the cases cited by Urlacher for his "least restrictive means" analysis involve the First Amendment and statutes regulating constitutionally protected speech. *See* App. Brief at 43-44 (citing *Arizona Right to Life Political Action Comm. v. Bayless,* 320 F.3d 1002, 1011 (9th Cir. 2003); *U.S. v. Playboy Entm't Grp., Inc.,* 529 U.S. 803, 813, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000)) (government may regulate content of constitutionally protected speech to promote a compelling interest if it chooses the least restrictive means to further the interest).

Urlacher cites to no authority for applying this analysis to LRA provisions in SVP cases.[31]

2. Urlacher Misconstrues the *Bergen* Court's Analysis of the "Best Interest" Standard

The goal of statutory interpretation is to discern and implement the Legislature's intent. *State v. Watson,* 146 Wn.2d 947, 954, 51 P.3d 66 (2002). If a statute is clear on its face, its meaning is derived from the plain language of the statute. *Id.* When a statutory term is undefined, the words are given their plain and ordinary meaning. *See id.; Bergen,* 146 Wn. App. at 534; *State v. Gonzalez,* 168 Wn.2d 256, 263, 226 P.3d 131 (2010) (court may look to dictionary for ordinary meaning).

Urlacher's claim that the *Bergen* Court ignored fundamental rules of statutory construction lacks merit. Urlacher misconstrues *Bergen.* First, *Bergen* did not interpret the "best interest" standard to relate "*solely* to treatment" as Urlacher asserts. *See* App. Brief at 45-47 (emphasis added). Rather, the Court explained that treatment needs are just one aspect of the "best interest" determination. *See Bergen,* 146 Wn. App. at 529-32.

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[31] Urlacher's reliance on *O'Connor v. Donaldson,* 422 U.S. 563, 575, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975) is also misplaced, and this Court has rejected a similar argument. *See Bergen,* 146 Wn. App. at 529. *O'Connor* involved the involuntary commitment of a person who was not dangerous, and the Court held that the State cannot confine a person who is not dangerous and can live safely in the community. *O'Connor,* 422 U.S. at 573-75. "It therefore does not apply here, where the committed individual has already been found to be a danger to the community and does not challenge that finding." *See Bergen,* 146 Wn. App. at 529.

The Court's analysis regarding treatment considerations was in response to Bergen's due process challenges, including his vagueness challenge based on the trial court's refusal to define "best interest." *See id.* at 523-32. In *Bergen,* the trial court did not define "best interest" or "adequate to protect the community." *See id.* at 531-34. The *Bergen* Court explained that these terms "can be understood by persons of common intelligence and reasonably applied within the statute's intent." *Id.* at 520. Second, when the Court was tasked with applying rules of statutory construction to the "adequate community safety" standard, it applied the proper analysis. The Court explained that the phrase should be given its ordinary meaning because it is not defined by statute and plain words do not require construction. *Id.* at 534. This same analysis applies to the "best interest" standard.

D. The State Will Follow the Applicable Rules of Appellate Procedure as to a Cost Bill if it Substantially Prevails on Appeal

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review or the commissioner or clerk determines the offender does not have the current or likely future ability to pay. RAP 14.2. Under the Rules of Appellate Procedure (RAPs), the State may simply present a cost bill as provided in RAP 14.4.

State v. Sinclair, 192 Wn. App. 380, 385, 367 P.3d 612 (2016). The State is not obligated to request an award of costs in its appellate brief. *Id.* If the State substantially prevails on appeal, it will follow the applicable RAPs in terms of a cost bill, and Urlacher may object at that time. *See* RAP 14.5.

V. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the order denying Urlacher's conditional release to an LRA.

RESPECTFULLY SUBMITTED this 28th day of August, 2017.

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NO. 49781-6

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Detention of: CHARLES URLACHER, Appellant.	DECLARATION OF SERVICE

I, Erik J. Frost, hereby declare as follows:

On August 28th, 2017, pursuant to the Electronic Service Agreement, I served a true and correct copy of Respondent's Brief and Declaration of Service via electronic mail, addressed as follows:

JODI R. BACKLUND
backlundmistry@gmail.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 28th day of August, 2017, at Seattle, Washington.

Erik J Frost

ERIK J. FROST

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE - CRIMINAL JUSTICE DIVISION

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